Supreme Court, U.S.
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No. 01-62

In The

Supreme Court of the United States

CHESTER COX, JR., et al.,

Petitioners,

v.

CITY OF WICHITA FALLS, TEXAS,
A Texas Incorporated Municipality;
UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF

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ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

A. The City Proffers No Cogent Argument In Opposition To The Petition

The City's token Opposition Brief is confined to one assertion -- Texas statutes do not require that the challenged zoning Ordinance be adopted in accordance with a comprehensive plan. Without any supporting reasoning whatsoever, the City speciously leaps from this statutory construction argument to the inapposite conclusion that the Ordinance is constitutional. (City Op. Br., 6.) There can hardly be a serious dispute that the mere omission from Texas statutes of a comprehensiveness requirement for the Ordinance is not even relevant to, no less dispositive of, whether the due process and equal protection clauses of the Constitution require zoning to be enacted in accordance with a comprehensive plan. While the City's absurd constitutional argument is bereft of any merit, its Opposition Brief does confirm at least that the City can articulate no state law comprehensiveness requirement applicable to the Ordinance, thus squarely presenting the federal constitutional question for this Court's review.

The City's Opposition Brief identifies no factual misstatements in the Petition, nor does it rebut any of the Petition's legal arguments. In the face of the affirmative requirements of Supreme Court Rule 15.2, the City's categorical silence confirms that: the Petition is factually accurate; the Fifth Circuit and District Court decisions are in conflict with numerous relevant decisions of this Court, the Eighth Circuit Court of Appeals, and numerous state courts of

last resort; and the constitutional issues are of great public importance and are likely to recur. In essence, the City fails to advance any factual basis or cogent legal argument in opposition to the Petition.

B. The United States Waived Any Objections To The Constitutionality Of The Ordinance

In its Opposition Brief, the United States argues the merits of the Ordinance's constitutionality for the very first time in this litigation. The United States never addressed the Ordinance's constitutionality before either the District Court or the Fifth Circuit. The United States has waived any defense it may have once been able to assert by consistently failing to address the merits of the Ordinance's constitutionality.[1] It cannot now oppose certiorari to review the merits of the Ordinance's constitutionality when it failed to assert any defense of the Ordinance's constitutionality before either the Fifth Circuit or the District Court. For this reason, the first numbered point in the United States' Opposition Brief should be disregarded in its entirety. (U.S. Op. Br., 8-14.)

C. Conflict With The Relevant Decisions Of This Court The Eighth Circuit, And State Courts Of Last Resort

The arguments concerning the constitutionality of the Ordinance submitted by the United States in opposition to the

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1 In its Brief to the Fifth Circuit the United States presented only two issues: 1) whether it could be liable as a "co-zoner" under 42 U.S.C. § 1983; and 2) whether the AICUZ Regulations were constitutional. (U.S. Ans. Br., 2.) Moreover, the United States explicitly confirmed that "[t]he issues raised by Cox as to the validity of the City ordinance, presented as the first and second issues in Cox's brief, are addressed by the City in its brief as appellee, and are not addressed herein." (*Id.* at 2, n.1.)

Petition are internally inconsistent, unsupported by any fair reading of the relevant cases, and so far out of sync with long established principles of land use law as to be fundamentally dangerous to very basic private property rights.

The United States asserts that "[n]othing in the Constitution requires a local government to adopt a comprehensive zoning plan, if it avoids arbitrary or irrational action." (U.S. Op. Br. at 9.) This categorical misstatement of the law is predicated on the fallacious assumption that a municipality can enact zoning that is rational without zoning comprehensively. Put simply, a municipality cannot possibly allocate land use rationally via zoning if it does not do so in accordance with a comprehensive plan. The very bedrock upon which the legality of zoning rests is that government can rationally enact zoning, thereby separating and prohibiting on a zone by zone basis numerous classes of land uses that are not nuisances, only if zoning is undertaken comprehensively. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

As this Court is well aware, government can prohibit specific offensive land uses that are nuisances without resort to zoning. *Mugler v. State of Kansas*, 123 U.S. 623 (1887). Zoning, however, burdens property far more significantly than mere nuisance abatement. Typically, zoning prohibits on a district by district basis entire categories of land uses that are not nuisances in order to attain the benefits that arise from a comprehensive plan of predictable and orderly development of property. *See Euclid*, 272 U.S. at 390-94. The very notion that local government could prohibit otherwise lawful uses of property that were not nuisances was controversial and the subject of conflicting state court decisions when *Euclid* was heard. Indeed, even this Court struggled mightily with the issue. *Euclid* finally upheld the constitutionality of

comprehensive zoning only after rehearing. *Id.* at 365.

Because zoning involves a very significant abrogation of private property rights, the *Euclid* Court took great pains to thoroughly examine the justification for and public benefits to be derived from comprehensive zoning, quoting at length from opinions of various state courts of last resort that sustained the constitutionality of comprehensive zoning. *Id.* at 390-94. Only after this exhaustive analysis of the benefits to the general welfare arising from comprehensive zoning did this Court ultimately sustain the extraordinary power of local government to zone. *See Moore v. City of East Cleveland*, 431 U.S. 494, 513-14 (1977) (confirming that *Euclid* authorized not only nuisance abatement, but also sustained the facial constitutionality of state government's power to create and implement a comprehensive land use plan via zoning); and *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 690, n.12 (1976) (Stevens, J., dissenting) (confirming that the comprehensive plan is the essence of zoning, without which there can be no rational allocation of land use; quoting from *Udell v. Haas*, 235 N.E.2d 897, 900-901 (1968).)

The United States cites no case from this Court, any federal court, or any state court, holding that zoning is constitutional even if not enacted in accordance with a comprehensive plan. Moreover, the United States' contention that the Constitution does not require the initial enactment of zoning to be in accordance with a comprehensive plan is in irreconcilable conflict with the United States' concession that a rezoning will be struck down as unconstitutional spot zoning or reverse spot zoning if it is not in conformity with a comprehensive plan. (U.S. Op. Br., 8, 12-13.) This conflict is of particular significance because the United States attempts to rebut the assertion that the Fifth Circuit's decision is in conflict

with this Court's relevant decisions and decisions of state courts of last resort by focusing principally on spot zoning and reverse spot zoning.

The United States concedes that when property is rezoned for less favorable treatment than surrounding properties ("reverse spot zoning"), or rezoned for more favorable treatment ("spot zoning"), such a rezoning is unconstitutional unless it is in conformity with a comprehensive plan. (U.S. Br. at 8; citing vis-à-vis reverse spot zoning *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 132, 139-40 (1978); and U.S. Op. Br., 8, 12-13; citing vis-à-vis spot zoning *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66 (Minn. 1984); *East Lands, Inc. v. Floyd County*, 262 S.E.2d 51 (Ga. 1979); and *Hewitt v. County Commissioners*, 151 A.2d 144 (Md. 1959).) Thus, whether a rezoning is challenged as spot zoning or reverse spot zoning, the relevant constitutional inquiry is the same: whether the rezoning was arbitrary or whether it was enacted in accordance with a comprehensive plan.

The United States does not recognize (or chooses to ignore) the obvious inconsistency between its proper acknowledgement that rezonings require consistency with a comprehensive plan and its erroneous assertion that the initial enactment of zoning does not. Both the adoption of a zoning ordinance and its amendment are legislative acts in which the identical powers of local government are exercised. Zoning must be in accordance with a comprehensive plan to be rational, both at the time of its initial enactment and subsequent amendment. If comprehensiveness was not required at the time of adoption, then there would be no comprehensive plan in existence to gauge the consistency of a subsequent rezoning. In a remarkable concession, the United States expressly concedes this precise point. In its citation to *Amcon*, the United States

inserts the following parenthetical: "[zoning] amendments are required to conform to a 'previously existing comprehensive plan' in order to avoid 'arbitrary or capricious exercise of the zoning power' and 'invalid spot zoning'." (U.S. Op. Br., 12.) The United States' own brief refutes its central argument.

The only fair reading of this Court's relevant decisions is that the Constitution requires that zoning be comprehensive in order to be rational and not arbitrary or capricious. Thus, the Fifth Circuit's decision conflicts with the relevant decisions of this Court, as well as the relevant decisions of state courts of last resort.

The United States also contends that the Fifth Circuit's decision in this case is not in conflict with the Eighth Circuit's decision in *Women's Kansas City St. Andrew Society v. Kansas City*, 58 F.2d 593 (1932). (U.S. Op. Br., 11.) The United States does not dispute that the Eighth Circuit, relying on *Euclid* and *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925), held that zoning which excludes land uses from residential districts can be sustained only if such zoning is in accordance with a comprehensive plan. However, the United States asserts that no conflict exists because *Women's Kansas City* arose in the context of an ordinance restricting districts to particular classes of residents, while this case arises under different factual circumstances. (U.S. Op. Br., 11.) The conflict articulated by Petitioners arises from the Fifth Circuit's rejection of the general rule that zoning must be enacted in accordance with a comprehensive plan to be constitutional. The mere notation that the two cases arise in different factual settings does not refute that the two cases are in conflict concerning whether zoning must be comprehensive to be constitutional. Obviously, cases often arise in different factual circumstances, but implicate the same general rule. The conflict is direct and obvious -- the

Eighth Circuit holds that zoning must be in accordance with a comprehensive plan to be constitutional, while the Fifth Circuit does not.

Regarding conflicts with decisions of state courts of last resort, the United States concedes that Petitioners' position is supported by *State ex rel. Carter v. Harper*, 196 N.W. 451 (Wis. 1923). (U.S. Op. Br., 13.) In its discussion of *Carter*, the United States notes that the Wisconsin Supreme Court distinguished comprehensive zoning from a previous case in which:

> a statute had been invalidated because it 'was enacted purely for the protection of the state capitol, and that, as the state could not take private property to be used as a site for its capitol, no more could it limit the use of property for the protection of the capitol.'

(U.S. Br., 13-14, quoting from *Carter*, 196 N.W. at 453 (emphasis added).) The case concerning the Wisconsin capitol, referred to in the quoted text from *Carter*, is *Piper v. Ekern*, 194 N.W. 159 (Wis. 1923). It is noteworthy that the United States does not attack the holding of the Wisconsin Supreme Court in *Piper*, for the parallel between *Piper* and this litigation is undeniable. In *Piper*, the Wisconsin state legislature adopted a statute limiting the height of buildings surrounding the state capitol in order to prevent the capitol from being damaged in the event of fire or other disaster. The Wisconsin Supreme Court struck down the statute holding that government cannot impose such land use regulations solely to protect or benefit a governmental facility, since such regulations must be adopted comprehensively and cannot be used as a substitute for acquiring necessary property rights via eminent domain. That is

the holding of *Piper* summarized in *Carter* and quoted by the United States in its Opposition Brief.

An extraordinarily similar pattern of events gave rise to this litigation. The United States adopted AICUZ Regulations: (1) prohibiting all military air installations from acquiring various property rights unless the operational integrity of the air installation is manifestly threatened; and (2) mandating that all military air installations exhaust all possibilities of eliminating such property rights via local enactment of zoning. (U.S. Op. Br., n.1; *see* 32 C.F.R. 256.4(b)(2)(ii)(B).) It is undisputed that: (1) Sheppard Air Force Base actively sought enactment by the City of numerous land use prohibitions; (2) the City enacted such prohibitions in the Ordinance exactly as Sheppard sought; (3) the Ordinance was imposed outside the City's borders on Petitioners' lands, within the otherwise unzoned County; and (4) the Ordinance was enacted solely to implement the Sheppard AICUZ Study and was not adopted in accordance with a comprehensive plan.

As expressly acknowledged by the United States in its discussion of *Carter*, and as held by the Wisconsin Supreme Court in *Piper*, zoning solely to eliminate private property rights in order to confer a benefit upon a governmental facility is unconstitutional. The contrary decision by the Fifth Circuit is in direct and irreconcilable conflict with both *Carter* and *Piper*. If the United States requires property rights for Sheppard, its proper course of conduct is to acquire such property rights via eminent domain; not to misuse local zoning to evade the necessity of condemnation.

Finally, the United States blatantly misrepresents Petitioners' claims concerning the Ordinance's constitutionality by falsely alleging that Petitioners demand "that all the property

in a given municipality or county be regulated simultaneously, by one massive enactment, or treated identically." (U.S. Op. Br., 9.) Petitioners never made such demands in any pleading at any time and never advocated such a meaning of comprehensive zoning. Moreover, the Court should not be diverted by such hyperbole from the undisputed fact that neither the City nor the United States has ever argued that the Ordinance is comprehensive. The Ordinance lacks all of the indicia of comprehensiveness: (1) it imposes no reciprocal benefits and burdens as it solely burdens Petitioners by imposing numerous severe restrictions on benign uses of property (such as proscribing single family homes), all for the benefit of the United States; (2) it regulates for one purpose only -- to implement the Sheppard AICUZ Study -- not for the wide range of purposes that are normally part of a comprehensive zoning plan as discussed in *Euclid* and *Udell*; and (3) it zones only a miniscule fraction of the otherwise unzoned land in the County and delineates the land zoned solely in relation to Sheppard, similar to the "ring" drawn around the capitol in *Piper*.

If municipalities need not zone in accordance with a comprehensive plan, the potential for abrogation of private property rights is immense. While this Court's takings jurisprudence places an outer limit on land use regulation, it typically does so "as applied" to property when a land use regulation goes "too far." The comprehensive plan requirement is the critical outer limit on the facial constitutionality of zoning irrespective of its ultimate application to particular property. The Fifth Circuit's decision to the contrary is a dangerous evisceration of private property rights.

D. Liability Of The United States As A "Co-Zoner"

The actions of the United States were not benign

"advisory" activities, as the United States claims. The AICUZ Regulations do not merely authorize giving planning advice. Those Regulations mandate that all military air installations seek local zoning legislation to eliminate private property rights, as well as mandate that such efforts must be exhausted before acquisition by eminent domain can even be contemplated. 32 C.F.R. 256.4(b)(2)(ii)(B).

These exhaustive efforts mandated by the AICUZ Regulations arrive with a threat -- sometimes veiled; sometimes not. If the locality does not adopt the zoning sought by the air installation; it could close. (U.S. Op. Br., 16.) The threat can be overwhelming to communities, like the City, where the Base is its largest employer. The United States has institutionalized this threat via the AICUZ Regulations to mandate that its air installations seek the destruction of property rights under color of state law so that it need not acquire such rights by eminent domain. *De-Tom Enter., Inc. v. United States*, 552 F.2d 337 (Ct. Cl. 1977) and its progeny are inapposite. They hold that the United States is not liable for a taking when it opposes a rezoning sought by a private property owner to allow increased development. There is nothing in *De-Tom* that immunizes the United States from liability under 42 U.S.C. § 1983 when it seeks and obtains unconstitutional zoning under color of state law to evade the necessity of property rights acquisition by eminent domain.

Respectfully submitted,

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